EDITOR'S NOTE

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87-237 (1)

No.

Supreme Court, U.S.
FILED
JUN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT FOR THE
UNITED STATES OF AMERICA
TERM

KEITH MILTON RHINEHART and the AQUARIAN FOUNDATION,

Appellants,

vs.

TRIBUNE PUBLISHING COMPANY, INC., et al.

Appellees.

ON APPEAL FROM THE
WASHINGTON STATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

Counsel for Appellants

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40 pp

QUESTIONS PRESENTED

1. Did the Trial Court Order pursuant to Washington Civil rules to comply with discovery and the accompanying protective order impermissibly regulate the Plaintiffs-appellants Constitutional Right to Freedom in the Exercise of their Religion when less restrictive alternatives were available to achieve the same objectives?

2. Was dismissal of the Plaintiffs-Appellants case pursuant to a Washington Civil Rule for noncompliance with a discovery order a denial of Due Process of Law under the United States Constitution?

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REFERENCE TO DECISION BELOW

The Washington State Supreme Court approved the Plaintiffs-appellants' Motion for Extension of Time, but denied their Petition for Review to that court on March 27, 1987. That decision was reported at Rhinehart v. KIRO, Inc., 108 Wn.2d 1008 (1987).

GROUNDS FOR JURISDICTION

Nature of Proceedings: The Plaintiffs Keith Milton Rhinehart and the Aquarian Foundation filed suit against the Defendants for Defamation and Invasion of Privacy. The case was dismissed for failure to comply with the State Superior Court's Discovery order on September 19, 1983. The Washington Court of Appeals affirmed the trial court's decision on August 4, 1986 and denied the Plaintiffs Motion

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for Reconsideration on September 11, 1986. The Washington State Supreme Court denied the Plaintiffs Petition for Review on March 31, 1987.

Jurisdiction is conferred on this court by 28 U.S.C. 2101(c). Appeal lies to the United States Supreme Court if the Appellants contend that the application of State Court Rules violated the appellants' rights under the United States Constitution.

The Supreme Court will reexamine the Appellants First Amendment Rights.

PROVISIONS AND STATUTES INVOLVED IN APPEAL

U.S. Constitution First Amendment:

Congress shall make no law respecting an establishment of religion or preventing the free exercise thereof.

WA CR 37(b)(2)(c) provides:

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permit discovery... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part therof, or rendering a judgment by default against the disobedient party.

THE FACTS

The Defendants' KIRO AND KOMO each made a series of broadcasts during December, 1979 characterizing the Aquarian Foundation as a group set up to defraud its members and Reverend Keith Milton Rhinehart as a fraud, evader of the law and child molester.

During discovery, KIRO, through interrogatories to the Plaintiffs, requested three religious films/videotapes and

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extensive church documents. On August 11, 1983 the trial court granted the Defendants one copy of each of the films/ videotapes and the right to discover all church files. At this point, Aquarian Foundation had already produced for the Defendants over 100 documents after over 100 man hours of research through their own files.

The Court denied the Plaintiffs Protective Order and signed instead a more limited Protective Order. The Plaintiffs Protective Order provided the Defendants a copy of all relevant portions of the videotapes after allowing the Defendants to view them in a setting which preserved their sacred nature. Under the Proposed Order, once the Defendants identified relevant portions of any tape, the court would then view that portion

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to confirm its relevance. The proposed order struck a balance between the Plaintiffs free exercise of religion rights and the Defendants discovery rights. The court's order allowed the Defendant a complete copy of the tape while preventing the Defendants from using the materials produced for commercial purposes. This order protects Freedom of Association rights but does nothing to protect the religious and sacred nature of the tapes.

In addition at the time of this order the trial judge stated that substantial discovery had occured.

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QUESTIONS TIMELY RAISED ON APPEAL

Federal Constitutional questions were raised orally during argument on the Motion for a Protective Order on August 11, 1983 and on the Motion for Dismissal on September 19, 1983. They were raised in written briefs to the Washington Court of Appeals and the Washington Supreme Court.

QUESTIONS ARE SUBSTANTIAL

The Right to Free Exercise of Religion is protected by the First Amendment and the right to Due Process of Law is protected by the 14th Amendment of the Constitution. Both are important and substantial rights.

1. FREE EXERCISE

The Protective order entered on September 19, 1983 did protect the Plain-

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tiffs-appellants rights to privacy and freedom of association, but it did not protect their first Amendment right of free exercise of their religion.

> Congress shall make no law respecting an establishment of religion or preventing the free exercise thereof.

U.S. Constitution First Amendment.

The United States Supreme Court has interpreted this to mean that government can never regulate religious beliefs and may only regulate religious actions under certain conditions. Sherbert v. Verner, 374 US 398, 10 L Ed 2d 965 (1963).

> The Free Exercise Clause means that the government is prohibited from interfering with or attempting to regulate any citizen's religious beliefs, from coercing him to affirm beliefs repugnant to his religion or conscience and from directly penalizing or discriminating against him for holding beliefs contrary to those held by anyone else.

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The Plaintiff-Appellants believed the tapes invloved were sacred religious articles. The Washington Supreme Court previously ruled that Reverend Keith Milton Rhinehart is a spiritual leader of a religious group, the Aquarian Foundation. Rhinehart v. The Seattle Times, 98 Wn. 2d 226, 654 P.2d 673 (1982), aff'd 467 U.S. 20, (1984). The Protective Order proposed by the Plaintiffs would protect their right to free exercise of religion by allowing viewing of the tapes in a supervised setting while allowing the Defendant-Appellees to make copies of all pertinent portions. The trial court's limited protective order only protected a portion of the Plaintiffs-appellants' constitutional rights.

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2. DUE PROCESS

Dismissal of the Plaintiffs' case against Defendants KIRO and KOMO was inappropriate because it violated Plaintiffs' Due Process rights.

Dismissal of a case for failure to comply with discovery requests violates the due process clause when the Plaintiffs' refusal to comply was not willful or deliberate, dismissal goes beyond the necessities of the situation, and the Plaintiffs would not have benefitted from his noncompliance. Societe Internationale, 357 U.S. 197, 2L. Ed.2d 1255, (1958). Dorsey v. Academy Moving and Storage, 423 F2d 858 (9th Cir., 1970), Dismissal cannot be a mere punishment. Societe Internationale, at 210.

The Plaintiffs inability to comply with discovery was neither willful nor

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deliberate. In the case at bar the trial court found prior to dismissal that the Plaintiffs had substantially complied with discovery requests. In addition, the Plaintiffs made a reasonable showing of inability to comply because of their religious beliefs. Plaintiffs refusal to comply was far from willful and deliberate.

Dismissal of the case went beyond the necessities of the situation. Societe Internationale, supra. The Plaintiffs proposed a protective order that would protect their own First Amendment Rights and the Defendants Discovery Rights.

Plaintiffs would not have benefitted from their own noncompliance. Plaintiffs' inability to produce the ordered discovery will allow the court

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to draw inferences infavorable to the Plaintiffs. Societe Internationale, supra. Under Civil Rule 37(b)(2)(A and B), the failure to provide requested materials provides that either the facts in those materials are established or that the plaintiffs cannot support or oppose designated claims or offenses.

In this case, because Plaintiffs religious beliefs prevent them from producing the discovery, they are deprived of its use. The lack of the evidence may cause problems with the adequacy of Plaintiffs' proof of their own case, Dorsey, supra, e.g. their scientific basis for the practice of certain religious phenomena.

By dismissing the Plaintiffs' case after their failure to comply with discovery orders, the trial court violated the Plaintiffs' right to due process.

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The Plaintiffs noncompliance was not willful or deliberate; dismissal goes beyond the necessities of the situation; and the Plaintiffs will not benefit from their own noncompliance if no sanction is imposed.

The Plaintiffs present substantial questions for review. The Plaintiffs Right to Free Exercise of Religion was violated by the United Protective Order entered by the trial court. Their right to Due Process of Law was violated by the trial court's premature dismissal.

QUESTIONS OF CONSTITUTIONAL INTERPRETATION

These are important for the U.S. Supreme Court's consideration. They go to the heart of the purposes of Constitutional protections, to allow access to court process to all on the merits

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of their claims. Therefore, the Plaintiffs-appellants respectfully request that the U.S. Supreme Court accept jurisdiction of these questions.

Dated this 26th day of May, 1987.

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Attorney at Law

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IN THE COURT OF APEALS OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, Appellants, WILLIAM R. POWERS and LILA LEE POWERS, husband and wife, d/b/a POWERS STUDIO, Plaintiffs, vs. KIRO, INC.; FISHER BROADCASTING, INC., and KOMO; JOHN SANDIFUR and JANE DOE SANDIFUR, husband and wife; Respondents, TRIBUNE PUBLISHING COMPANY, INC.; RICHARD SYPHER and JANE DOE SYPHER, husband and wife; JOAN DUMENCHUK and JOHN DOE DUMENCHUK, wife and husband; and STARR ELLIOTT, Defendants.	NO. 13848-1-I DIVISION ONE FILED AUG. 4, 1986

GROSSE, J. -- This is an appeal by Keith Milton Rhinehart and the Aquarian Foundation from a dismissal with prejudice of their case

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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for their failure to comply with certain discovery orders. Appellants allege that the disclosure of the materials in question would violate their constitutional right to the free exercise of religion. Appellants also argue that even if the order of discovery was proper, dismissal of their case with prejudice was inappropriate. We find neither contention meritorious and affirm the trial court.

Keith Milton Rhinehart (Rhinehart) is the spiritual leader of the religious group The Aquarian Foudantion (Foundation), both of whom brought an action for defamation and invasion of privacy because of various news stories broadcast by KIRO and KOMO. Rhinehart and the Foundation refused to disclose certain of the information requested, including three videotapes. One tape was produced and aired on Japanese

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public television in 1958. The second tape was aired in Washington on public television by KTVW in 1962. The third tape was a recording of a religious ceremony performed by Rhinehart at the Walla Walla penitentiary before approximately 800 prisoners. Additionally, KIRO was granted access to the Foundation's files on articles mentioning apportation, a phenomenon peculiar to Rhinehart's religious practices.

Pursuant to CR 26, the trial court issued an order compelling Rhinehart and the Foundation to comply with these requests. KIRO was also awarded terms. By its order, the trial court limited the use of the information to preparation of the defenses absent further order of the court. The information gained by means other than the discovery process was not subject to the protective order. Prior to the issuance of the orders

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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compelling discovery, the trial court balanced the competing interests of the parties and their respective rights as required by Rhinehart v. Seattle Times Co., 98 Wn. 2d 226, 654 P.2d 673 (1982). Aff'd, ___ U.S. ____, 81 L.Ed. 2d 8, 104 S. Ct. 2199 (1983).

The trial court did not violate Rhinehart's or the Foundation's freedom to exercise religion by compelling discovery. Rhinehart's assertion to the contrary is without merit. The cases cited in support of the proposition deal with restrictions on freedom to practice a religion and are thus inapposite. The discovery process in the instant case does not impinge on Rhinehart's or the Foundation's freedom to practice religion.

Rhinehart and the Foundation are willing to allow KIRO and KOMO to view the "sacred" tapes. Their main objection is

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to their copying. It is thus not against their religious principles that these tapes may be viewed by persons other than members (such a position would be hard to maintain since two of the tapes had already been broadcast to the public at large). Rather, the appellants fear that the tapes will be disseminated to the public at large thus putting members at risk. It was precisely because of this argument that the trial court issued the protective order. The arguments propounded by appellants are really ones that should be made in support of an invasion of privacy action. Having lost this argument already, it appears that appellants are substituting religious freedom in its place. See Rhinehart v. Seattle Times Co., supra, wherein the Washington State Supreme Court dismissed the Plaintiffs' cross appeal in which it was alleged that disclosure of the

APPENDIX A:
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membership lists violated the members' right of privacy. In that case the court found that Rhinehart had failed to show that the protective order was inadequate to prevent any abuse threatened by disclosure to the Seattle Times. There, as here, appellants are "attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information." Rhinehart, at 257-58. As the Washington State Supreme Court stated:

> The protective order shields the plaintiffs from abuse of the discovery privilege. The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right. There is no showing that the protective order is inadequate to prevent any abuse threatened by the defendants.

Rhinehart, at 257. Neither is there such a showing in the case at bar.

Appellants contend that the United States

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Supreme Court's failure to rule on the issue of protective orders in its review of the Rhinehart case leaves that issue open. Such an argument is specious. The Supreme Court's failure to rule specificallv on that issue does not change the present law of the State of Washington as enunciated by the Washington State Supreme Court in the Rhinehart decision.

Having thus disposed of the constitutional issue, we turn now to the question of whether dismissal of the case was appropriate. The remedy for a party's failure to comply with discovery lies within the discretion of the trial court. CR 37(b)(2)(C) provides in pertinent part:

> (b) **Failure To Comply With Order**
> . . .
>
> (2) Sanctions by Court in Which Action Is Pending. If a party... fails to obey an order to provide or permit discovery, . . . the court in

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> which the action is pending may make such orders in regard to the failure as are just. and among others the following:
>
> . . .
>
> (C) An Order Striking out pleadings or parts thereof,. . .

(Emphasis Added.)

A trial court's exercise of the broad discretion under CR 37 to impose sanctions for noncompliance with a discovery order will not be overturned unless there is a manifest abuse of discretion. Associated Mortgage Investors v. G.P. Kent Constr. Co., 15 Wn. App. 223, 548 P.2d 181 (1979). upholding dismissal of Plaintiffs' action because of their willful and deliberate noncompliance with the trial court's discovery order.

In the case at bar, the discovery process consumed 21 months. KIRO originally filed two sets of interrogatories and requests for production of documents on

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December 2, 1981 and January 5, 1982. A motion to compel answers was initially brought on January 26, 1982. In response, appellants amended their answers. Thereafter, negotiations and repeated threats to file a motion to compel by KIRO resulted in further inadequate responses to the interrogatories. Between June and September, 1983, several court hearings were held. In August, the trial court ordered appellants to produce the three tapes on or before September 6, 1983 subject to the protective or order. At that hearing, the trial court said it would entertain any other objections not brought out at the hearing. Appellants refused to comply and failed to offer any other reasons for their noncompliance. Their behavior was willful and deliberate. Without these documents the respondents' defense of some of the issues

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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raised in appellants' complaint could have been prejudiced. We find no abuse of discretion by the trial court in dismissing appellants' complaint.

Respondents request attorney's fees incurred in connection with their defense of this appeal. In support of this proposition, they cite Tamari v. Bache & Co. (Lebanon) S.A.C., 729 F.2d 469 (7th Cir. 1984) and Mickwee v. Hsu, 753 F.2d 770 (9th Cir. 1985) both of which upheld the imposition of attorney's fees on appeal under Fed. R. Civ. P. 37(b).

We find the holding in Basch v. Westinghouse Elec. Corp., 777 F.2d 165 (4th Cir. 1985), denying the award of attorney's fees the better rule in light of the faccts of the case at bar. In Basch, the court stated:

> The present case, however, does not present an appropriate occasion to penalize counsel for having taken an

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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> appeal from the district court's sanction. Seidenman's appeal, although found to be without merit, was not frivolous nor was it interposed to harass defendant or to delay implementation of a valid discovery order.

Basch, at 175. Similarly, the instant case presented an appeal found to be without merit but not one that this court can deem frivolous or interposed to harass or for purposes of delay. Tamari; see also Streater v. White, 26 Wn. App. 430, 613 P.2d 187 (1980). The request for fees on appeal is denied.

The trial court is affirmed.

WE CONCUR:

_____ _____

APPENDIX A:
ORDER AFFIRMING TRIAL COURT

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a Washington not-for-profit corporation, Appellants, WILLIAM R. POWERS and LILA LEE POWERS, husband and wife, d/b/a POWERS STUDIO, Plaintiffs, vs. KIRO INC.; FISHER BROADCASTING, INC., and KOMO; JOHN SANDIFUR and JANE DOE SANDIFUR, husband and wife; Respondents, TRIBUNE PUBLISHING CO., INC.; RICHARD SYPHER and JANE DOE SYPHER, husband and wife; JOAN DUMENCHUK and JOHN DOE DUMENCHUK, wife and husband; and STARR ELLIOTT, Defendants.	No. 13848-1-I DIVISION ONE ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

The appellants, Keith Milton Rhinehart and the Aquarian Foundation, having filed a motion for reconsideration herein,

APPENDIX B:
ORDER DENYING APPELLANTS' RECONSIDERATION

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and the court having determined that it should be denied; now, therefore, it is hereby

ORDERED that the appellants' motion for reconsideration be, and the same hereby is, denied.

DATED this 11th day of September, 1986.

Acting Chief Judge

APPENDIX B: ORDER DENYING APPELLANTS' RECONSIDERATION

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THE SUPREME COURT OF WASHINGTON

KEITH MILTON RHINEHART, and THE AQUARIAN FOUNDATION, Petitioners, vs. WILLIAM R. POWERS, et al., Respondents.	No. 53487-0 Court of Appeals No. 13848-1-I **ORDER DENYING PETITION FOR REVIEW**

This matter having come on before the Court on its March 31, 1987, Motion Calendar on Petitioner's Motion for Extension of Time to File Petition for Review and the Petition for Review. The Court having considered the motion and the files herein;

Now, therefore, it is hereby

ORDERED:

That Petitioner's Motion for Extension of Time to File Petition for Review is granted and the Petition for Review is denied on the merits.

APPENDIX C: **ORDER DENYING PETITION FOR REVIEW**

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DATED at Olympia, Washington this

31st day of March, 1987.

_____

CHIEF JUSTICE

APPENDIX C: **ORDER DENYING PETITION FOR REVIEW**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KEITH MILTON RHINEHART, a single person; THE AQUARIAN FOUNDATION, a not-for-profit corporation; WILLIAM R. POWERS and LILA LEE POWERS, husband and wife, d/b/a POWERS STUDIO, Plaintiffs, vs. KIRO, INC.; FISHER BROADCASTING, INC., and KOMO; TRIBUNE PUBLISHING CO., INC.; RICHARD SYPHER and JANE DOE SYPHER, his wife; JOHN SANDIFER and JANE DOE SANDIFER, his wife; JOAN DUMENCHUK and JOHN DOE DUMENCHUK, her husband; and STARR ELLIOTT, Defenants.	No. 81-2-16020-4 **NOTICE OF APPEAL TO COURT OF APPEALS, DIVISION I** Filed October 10, 1983

Keith Milton Rhinehart, a single person, and the Aquarian Foundation, a Washington not-for-profit corporation, Plaintiffs seek review by the designated appellate court of the final judgment of dismissal of Plaintiffs' claims against

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defendant KIRO, Inc., and the final judgment of dismissal of claims of Plaintiffs Keith Milton Rhinehart and the Aquarian Foundation against Fisher Broadcasting, Inc., KOMO, John Sandifer and Jane Doe Sandifer, his wife, both entered on September 23, 1983.

Plaintiffs Rhinehart and the Aquarian Foundation also seek review of the following orders:

Order	Date of Entry
Order Denying Reconsideration of Protective Order	... 09/23/83
Order of Dismissal(KIRO)	... 09/23/83
Order of Dismissal (Fisher Broadcasting, KOMO, and Sandifer	... 09/23/83
Order Compelling Production and Imposing Sanctions for Failure to	

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Make Discovery; Protective Order ... 09/19/83

Order Compelling Production, Granting Terms, and Limited Protective Order ... 09/19/83

Oral Decision of Honorable Liem E. Tuai ... 08/11/83

Order Compelling Discovery and Assessing Terms ... 06/06/83

DATED: October 10. 1983 EDWARDS AND BARBIERI

By_____
Charles K. Wiggins
Attorneys for Appellants and for Plaintiffs/William R. Powers and Lila Lee Powers, husband and wife, d/b/a Powers Studio

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APPENDIX D: **NOTICE OF APPEAL**

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Counsel for Defendant Star Elliott

D/7616E

APPENDIX D: **NOTICE OF APPEAL**

NO.

IN THE SUPREME COURT FOR THE UNITED STATES OF AMERICA
TERM

KEITH MILTON RHINEHART and the AQUARIAN FOUNDATION,

Petitioners,

vs.

TRIBUNE PUBLISHING COMPANY, INC., et al.

Respondents.

NOTICE OF APPEAL

RECEIVED
JUN 25 1987
Preston, Thorgrimson, Ellis & Holman

To: The Clerk of the Court

And To: Gordon Conger, Preston, Thorgrimson, Ellis & Holman, Attorney for Respondent KIRO, Inc.

And To: Keith A. Bolton of Peterson Lycette & Snook, P.S., Attorney for KOMO, Inc.

Please take notice that the Plaintiff-Appellants Aquarian Foundation and Reverend Keith Milton Rhinehart are filing an appeal with the United States Supreme Court of the decision by the Washington State Supreme court March 31, 1987, denying their Petition for Discretionary Review. Appeal is taken

APPENDIX E: PROOFS OF SERVICE-33

No.

IN THE SUPREME COURT FOR THE UNITED STATES

OF AMERICA
TERM

KEITH MILTOM RHINEHART and the AQUARIAN FOUNDATION,

Petitioners,

vs.

TRIBUNE PUBLISHING COMPANY, INC., et al.

Respondents.

RECEIVED
JUN 25 1987
Preston, Thorgrimson, Ellis & Holman

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

APPENDIX E: PROOFS OF SERVICE-34

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(206) 223-1888

COPY RECEIVED

IN THE SUPREME COURT FOR THE UNITED STATES OF AMERICA

KEITH MILTON RHINEHART and the AQUARIAN FOUNDATION, Petitioners, vs. TRIBUNE PUBLISHING COMPANY, INC., et al. Respondents.	NOTICE OF APPEAL

To: The Clerk of the Court

And To: Gordon Conger, Preston, Thorgrimson, Ellis & Holman, Attorney for Respondent KIRO, Inc.

And To: Keith A. Bolton of Peterson Lycette & Snook, P.S., Attorney for KOMO, Inc.

Please take notice that the Plaintiff-Appellants Aquarian Foundation and Reverend Keith Milton Rhinehart are filing an appeal with the United States Supreme Court of the decision by the Washington State Supreme court March 31, 1987, denying their Petition for Discretionary Review. Appeal is taken

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MAY 15 1987
PETERSEN MOORE & GIBSON P.S.

3

No.

IN THE SUPREME COURT FOR THE UNITED STATES OF AMERICA
TERM

KEITH MILTOM RHINEHART and the AQUARIAN FOUNDATION,

Petitioners,

vs.

TRIBUNE PUBLISHING COMPANY, INC., et al.

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

APPENDIX E: PROOFS OF SERVICE-36

LAW OFFICES OF
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NO.

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JUN 25 1987
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APPENDIX E: PROOFS OF SERVICE-38

No. 87-237

(2)

Supreme Court, U.S.
FILED
SEP 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

KEITH MILTON RHINEHART
and
THE AQUARIAN FOUNDATION,
Appellants,
v.
KIRO, INC.;
FISHER BROADCASTING INC.;
KOMO;
and
JANE DOE SANDIFER, his wife,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES' JOINT MOTION TO DISMISS

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September 10, 1987

BEE Legal Printers, Seattle, WA

RESTATEMENT OF QUESTION PRESENTED

Were Appellants' constitutional rights adequately protected when a court ordered production of certain documents and videotapes relevant to their defamation action and when, after Appellants repeatedly refused to comply with the court's order, it dismissed Appellants' action against Appellees?

PARTIES TO PROCEEDINGS BELOW

The parties before the trial court were as follows:

Plaintiffs: Keith Milton Rhinehart; The Aquarian Foundation; William R. Powers and Lila Lee Powers, husband and wife, doing business as Powers Studio.

Defendants: KIRO, Inc.; Fisher Broadcasting Inc.; KOMO; John Sandifer and Jane Doe Sandifer, husband and wife; Tribune Publishing Co., Inc.; Richard Sypher and Jane Doe Sypher, husband and wife; Joan Dumenchuk and John Doe Dumenchuk, husband and wife; and Starr Elliott.

Appellants in this proceeding are Keith Milton Rhinehart and The Aquarian Foundation. Appellees are KIRO, Inc.; Fisher Broadcasting Inc.; KOMO; and John Sandifer and Jane Doe Sandifer, husband and wife.[1]

KIRO, Inc. is a Utah corporation. Its parent company is Bonneville International Corporation, also a Utah corporation. All subsidiaries of Bonneville International Corporation are wholly owned.

Fisher Broadcasting Inc. is a Washington corporation. Its parent company is Fisher Companies Inc., also a Washington corporation. All subsidiaries of Fisher Broadcasting Inc. are wholly owned.

---

[1] Appellants' Jurisdictional Statement incorrectly identifies "Tribune Publishing Co., Inc., *et al.*" as "Appellees." Tribune Publishing Co., Inc., Richard Sypher and Jane Doe Sypher, Joan Dumenchuk and John Doe Dumenchuk, and Starr Elliott were not involved in the discovery dispute that resulted in dismissal of Appellants' claims and are not among Appellees here.

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IN THE

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KEITH MILTON RHINEHART
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and
JANE DOE SANDIFER, his wife,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES' JOINT MOTION TO DISMISS

Pursuant to Supreme Court Rule 16.1, Appellees move to dismiss the appeal filed on behalf of Keith Milton Rhinehart and The Aquarian Foundation (hereinafter "Appellants") on the ground that the questions presented are insubstantial and have been previously decided by this Court.

STATE LAW INVOLVED

The appeal raises the question of the validity of Washington Superior Court Civil Rule ("Civil Rule") 37(b)(2)(C) as applied to Appellants. Civil Rule 37(b) sets forth sanctions available against a party that fails to comply with a court

order compelling discovery. In pertinent part, Civil Rule 37(b)(2) provides as follows:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> (c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or *dismissing the action* or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(Emphasis added.)

RESTATEMENT OF FACTS

A. Background.

Rhinehart is the self-styled "spiritual leader" of the Aquarian Foundation, a Seattle-based spiritualist church. In December 1979, Rhinehart and nine members of his church traveled to Bogota, Columbia, to attend a parapsychology convention. While in Bogota, they were arrested and charged with fraud in the conduct of a seance. KIRO Newsradio ("KIRO") and KOMO News ("KOMO"), along with other Seattle news media, broadcast reports of these arrests.

KIRO's broadcasts prompted telephone calls from former members of the Aquarian Foundation. The callers charged that Rhinehart used the Aquarian Foundation to bilk money from members through the sale of "jewels" supposedly produced from various orifices of Rhinehart's body ("apportation"). KIRO reported these charges and broadcast portions of the callers' statements about the "jewels."

Rhinehart, the Aquarian Foundation, and two Foundation members sued KIRO, KOMO, and other news media sources, reporters and publishers. The complaint alleged, *inter alia*, that Rhinehart was a private figure; that KIRO's and KOMO's broadcast contained false statements and made false innuendos about Rhinehart and the Foundation; that KIRO and KOMO were both negligent and malicious in making these broadcasts; and that Rhinehart and the Foundation had, as a result, lost income and donations. In their answers, KIRO and KOMO denied these allegations.

B. Early Discovery Efforts.

KIRO began discovery soon after the complaint was filed to elicit the factual basis for Appellants' claims. In late 1981 and early 1982, KIRO served upon Appellants interrogatories and requests for production designed to elicit the factual basis for their claims of liability and damages. Appellants failed to respond, despite KIRO's extension of time, and in 1982 KIRO filed its first motion to compel. On the eve of hearing, Appellants served objections and partial answers, and KIRO struck its motion.

Despite inadequacies in Appellants' answers, KIRO elected not to press its discovery requests until the Washington Supreme Court determined the validity of similar objections to discovery asserted by Rhinehart in a separate, though similar action against The Seattle Times and other media defendants.[2] On December 2, 1982, the Washington Supreme Court affirmed both the trial court's order compelling

[2] In that action for defamation and invasion of privacy, Rhinehart and other plaintiffs resisted disclosure of membership lists and financial information. There, as in the present case, Rhinehart and the other plaintiffs refused to comply with the trial court's order compelling production despite the trial court's entry of a protective order.

production and its protective order limiting the defendants' use of that information in the other case. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982).

After the Washington Supreme Court had denied motions for reconsideration and refused to stay its mandate in the *Seattle Times* case, KIRO's attorney contacted Appellants' attorney numerous times during April and May 1983 in an effort to obtain complete answers to discovery requests concerning Appellants' allegations that Rhinehart was a private figure, that the statements made by KIRO were false, and that Rhinehart and the Foundation were damaged through loss of members and donations as a result of the statements. Specifically, KIRO sought information concerning members, donors, and financial contributions; civil and criminal litigation in which Appellants had been involved; publications and telecasts regarding Appellants; and the phenomenon of "apportation."[3] Despite repeated assurances from Appellants' attorney that the requested information would be forthcoming, KIRO had received nothing by May 26, 1983.

On that date, KIRO filed its second motion for an order compelling discovery and, in addition, sought terms. KIRO indicated that it would stipulate to entry of a protective order identical to that entered and affirmed in the *Seattle Times* case.

Appellants flatly rejected any protective order. Instead, Appellants filed a motion for a stay of all discovery proceedings.

After the parties' respective motions were consolidated for hearing, Appellants served what they termed "supplemental" answers to KIRO's first set of discovery requests. These answers identified 169 newspaper articles concerning Rhinehart and the Foundation. None of the articles, however, was produced.

C. The June 6 Order Compelling Production and Assessing Terms.

On June 6, 1983, the trial court heard KIRO's motion to compel discovery and Appellants' motion for a stay of all proceedings. Appellants' motion was denied. In response to KIRO's motion, the trial court ordered Appellants to disclose membership and financial information, subject to the terms of a protective order mirroring that approved by the Washington Supreme Court in the *Seattle Times* case. The trial court did, however, stay the effect of its order until final resolution of the *Seattle Times* case by this Court.[4] As a result, Appellants did not have to produce any membership or financial information until this Court issued its decision affirming the Washington Supreme Court in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The trial court's protective order did not cover any other information.

Also, on June 6, 1983, the trial court ordered Appellants to answer fully KIRO's interrogatories and produce all documents relating to KIRO's other discovery requests no later than July 15, 1983. In response to Appellants' violations of discovery requirements, the trial court awarded $300.00 in terms to KIRO. The trial court also warned Appellants at that time that it would entertain a motion for further sanctions, including dismissal, if the July 15 deadline was not met.

---

[3] Appellants alluded to the phenomenon of apportation in their answers to interrogatories inquiring about gems or other objects produced from Rhinehart's body. "Apport" is defined as "motion or production of an object, by a spiritualistic medium, without apparent physical agency; also, the object so produced." *Webster's New International Dictionary* 132 (2d ed. 1950).

[4] Both parties in the *Seattle Times* case sought review by this Court via separate petitions for certiorari. Plaintiffs' petition for certiorari was denied, 467 U.S. 1230 (1984), while defendants' was granted, 464 U.S. 812 (1983).

Appellants paid the terms but totally ignored the trial court's July 15 deadline for responding to the discovery requests. After a further request from KIRO's attorney, on July 21, 1983, Appellants served an unsigned slightly revised version of their previous "supplemental" answers, together with an unsigned verification of those answers by Rhinehart. KIRO received signed copies six days later.

The revised answers included five pages of new (and untimely) objections to KIRO's discovery requests. Among the new objections raised by Appellants on July 22, 1983 was a demand for a protective order governing all pretrial discovery material. At this point, Appellants also objected

> to producing any of our sacred films outside of their religious context and without the defendants coming to church and viewing our sacred films in a proper, sincere religious context, explained by me [Rhinehart] during the presentation.

On July 22, 1983, KIRO's attorney sought to review and copy the written documents, chiefly newspaper articles, that Appellants had identified in their supplemental answers. Appellants' attorney refused to permit copying of more than a few of them unless KIRO entered into a stipulation restricting their use. Only after KIRO had begun preparing a motion to compel did Appellants, on July 27, 1983, release an incomplete set of documents.

Because of the imminence of Rhinehart's deposition, KIRO asked by a letter of July 29, 1983, that complete information be provided and related documents disclosed no later than August 1. When that deadline passed, KIRO filed its third motion for an order compelling discovery and, as in its second motion, sought sanctions.

Appellants responded to KIRO's motion by serving so-called "Second Supplemental Answers to Interrogatories."

consisting almost entirely of argument and objections, and (for the first time) a motion for a protective order. Among other things, Appellants' proposed protective order would have prohibited KIRO from copying any videotape or any printed material describing or referring to Appellants' religious practices. Many of the restrictions in the proposed protective order would have extended to information and documents already obtained from Appellants during discovery.

During this period, Appellants also frustrated KOMO's discovery efforts. KOMO served interrogatories on both Rhinehart and the Foundation in late June 1983. Despite Appellants' repeated assurances that answers would be forthcoming, Appellants did not respond to the interrogatories.

KOMO thereupon filed a motion to compel discovery, which was consolidated with KIRO's third motion. Both motions, as well as Appellants' belated motion for a protective order, were heard on August 11, 1983.

D. The August 11 Order Compelling Production and Granting Terms.

After argument, the trial court ordered Appellants to (a) produce three videotapes depicting public performances by Rhinehart no later than 12:00 noon on September 6, 1983; (b) pay KIRO terms of $750.00 by the same deadline; and (c) disclose documents prepared by Rhinehart or the Foundation that mentioned the phenomenon of "apportation." The trial court indicated that it would be inclined to dismiss Appellants' claims if the September 6 deadline was ignored. The trial court also ordered Appellants to respond to KOMO's interrogatories by September 12. In response to Appellants' concerns, the trial court imposed stringent limitations on copying and publication of videotapes and documents.

The September 6 deadline was ignored. The September 12 deadline for answering KOMO's interrogatories also was ignored.

Both KIRO and KOMO moved for dismissal. In a supporting affidavit, KIRO stressed the relevance of the materials sought to the issues of truth and public-figure status, as well as the prejudice to KIRO's trial preparation caused by Appellants' non-compliance. KIRO also noted Appellants' constant pattern of disobeying court orders compelling discovery and the likelihood that Appellants would, in the future, also refuse court-ordered discovery of membership records and apportation documents.

E. The Order of Dismissal.

On September 19, 1983, the court heard argument on Appellants' motion for reconsideration of the August 11 order and on the motions for dismissal by KIRO and KOMO. The court denied Appellants' motion, noting both that it was untimely and that it added nothing new to the arguments advanced by Appellants on August 11, 1983.

Because it did not have enough time available, the court did not enter an immediate order of dismissal. Appellants' attorney inquired whether belated compliance by Appellants would alter the sanctions imposed. The court indicated that in such a case it would likely impose terms for lateness but would not dismiss the action.

September 23, 1983, the parties returned for presentation of orders. Appellants still refused to comply with the court's order compelling production. The court thereupon entered orders of dismissal with prejudice and final judgments of dismissal as to KIRO and KOMO.

F. Subsequent Proceedings.

Appellants thereafter appealed to the Court of Appeals of the State of Washington, which affirmed the trial court's dismissal as not being an abuse of discretion. *Rhinehart v. KIRO, Inc.*, 44 Wn. App. 707, 723 P.2d 22 (1986). The Court of Appeals denied Appellants' motion for reconsideration by unpublished order entered September 11, 1986. The time period for filing a petition for review to the Washington Supreme Court expired October 13, 1986, without any action by Appellants.

On or about November 18, 1986, Appellants moved for an extension of time to file a petition for review. KIRO and KOMO opposed the motion. By letter dated January 16, 1987, the Washington Supreme Court directed Appellants to serve and file their proposed petition no later than February 2, 1987. This deadline came and went without service on either KOMO or KIRO. KOMO was eventually served on February 19, 1987, while KIRO was served on February 20, 1987.

On March 31, 1987, the Washington Supreme Court issued its order granting Appellants' motion for extension of time to file a petition for review and denying the petition for review on the merits. This appeal followed.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court.

Imposition of sanctions pursuant to Civil Rule 37, including dismissal of an action, is a matter of state law and is entrusted to the sound discretion of the trial court. *Associated Mortgage Investors v. G.P. Kent Construction Co.*, 15 Wn. App. 223, 229, 548 P.2d 558 (1976). In this case, the trial court's dismissal of Appellants' action was a permissible, indeed necessary, exercise of that discretion in view of Appellants' repeated, willful, and flagrant violations of discovery orders.

Contrary to Appellants' arguments, the dismissal of their action by the trial court raises neither important nor novel constitutional issues. The trial court's order compelling production did not unduly hamper Appellants in the exercise of their religion. The trial court's protective order was adequate to address their concerns and mirrored that considered by the state supreme court and this Court in *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), *cert. denied*, 467 U.S. 1230 (1984).

Appellants' due process claim is similarly meritless. The trial court accorded Appellants repeated opportunities to comply with its order and gave specific notice to them of the consequence of continued defiance. Dismissal under these circumstances raises no issue of due process.

1. *Free Exercise Claim.* Appellants first attempt to characterize their repeated and flagrant noncompliance with discovery orders as behavior protected by the Free Exercise Clause of the first amendment. However, they never identify the religious beliefs or practices which are violated by the discovery orders. Contrary to Appellants' assertions, cases construing the Free Exercise Clause do not establish the principal that courts lack authority to govern production of religious documents.[5]

Government action challenged as a violation of the Free Exercise Clause, such as an order compelling discovery, must pass two threshold tests. The first test distinguishes between government regulation of religious belief, which is always impermissible, and restrictions affecting religious conduct,

---

[5] Appellants cite no authority to support their position that a party claiming religious rights has exclusive control over the manner and extent of discovery of documents that it considers "sacred." Appellants' insistence on such control in this case is particularly ill-founded, because the trial court entered a protective order fully adequate to protect their legitimate interests.

which may be proper. *See Braunfield v. Brown*, 366 U.S. 599, 603 (1951) (freedom to act, even when action is in accord with religious convictions, is not totally free from legislative restrictions); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, (1940) (religiously motivated action may be regulated by state.)

The orders in issue here were permissible because they regulated what Appellants were required to do with their tapes if they wished to pursue their defamation claims and not what appellants were allowed or were required to believe.

The second threshold test under the Free Exercise Clause requires that the government action have both a secular purpose and a secular effect. *See Braunfield*, 366 U.S. at 607. Enforcement of the rules governing civil discovery has the secular purpose and effect of avoiding unfair surprise, permitting adequate trial preparation, and preserving order in the court's procedure. *Rhinehart v. Seattle Times Co.*, 467 U.S. at 34. Such rules are neither religiously motivated nor sectarian in their impact.

If, as in this case, the challenged government action passes these two tests, it is judged by balancing the cost to the government of altering its activity against the cost to the religious interest imposed by the government activity. *Gross v. City of Miami Beach*, 721 F.2d 729, 734 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984). Here, the trial court addressed the issue of governmental cost in its ruling on KIRO's and KOMO's motions to compel on August 11.

In ordering Appellants to produce the videotapes and documents, the trial court rejected as impractical Appellants' request that the court prescreen more than six hours of videotape to excise irrelevant portions, if any, or that the court adjudicate on a page-by-page basis whether copying of certain documents should be allowed. The trial court's order was proper, as scarce judicial resources cannot be wasted in over-

seeing a process designed to operate largely without judicial intervention. *Cf. Rhinehart v. Seattle Times Co.*, 467 U.S. at 36 ("heightened first amendment scrutiny of each request for a protective order would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals").

This Court has noted that the public interest requires a sound tax system and that such a system cannot accommodate "myriad exceptions flowing from a wide variety of religious beliefs." *United States v. Lee*, 455 U.S. 252, 260 (1982). The same can be said of our system of civil discovery. This system could not function if courts were forced to intercede in discovery disputes every time a litigant alleged that material was protected from discovery solely because of its religious significance.

Moreover, with respect to the burden imposed on their religion, Appellants failed to demonstrate to the trial court anything approaching the interest of the old-order Amish in preserving their way of life. Appellants expressed fear that the videotapes would be desecrated if viewed by Appellees' counsel. Yet they suggested judicial viewing of the same videotapes. It is not at all clear how this would have been less desecrating than a viewing by KIRO's and KOMO's attorneys. Appellants' fear of desecration seems unreasonable inasmuch as one of the tapes was broadcast on Japanese national television and another recorded a performance before 800 prison inmates. Neither did Appellants identify anything in their beliefs that might be threatened by production in accordance with the trial court's order.

In any event, Appellants' rights were adequately protected by the trial court's protective order. In *Rhinehart v. Seattle Times Co.*, the Washington Supreme Court summarily rejected similar objections to discovery:

> [C]ertain invasions of [plaintiffs' first amendment] rights are necessary to enable the courts to render a just decision

> upon the relevant facts. The protective order shields the plaintiffs from abuse of the discovery privilege. *The more extensive protection which they desire is within the discretion of the trial court in a proper case; but the plaintiffs are not entitled to such an order as a matter of right*. . . . All of the evidence covered by the order compelling disclosure was relevant to the plaintiffs' claims and the defense of those claims, and their legitimate interests in privacy and association were protected by the court's order insofar as was possible without denying the defendants the right to develop their defenses.

98 Wn.2d 226, 257-58, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20 (1984) (emphasis added).

Appellants' failure to address this holding forthrightly in their Jurisdictional Statement reflects their lack of candor throughout this protracted litigation. Appellants mention the case only once, and then in support of an insignificant fact. They fail to mention that they petitioned this Court for review of the Washington Supreme Court's decision. The issue they posed then in their petition for certiorari was as follows:

> Does the free exercise of religion clause of the first amendment preclude a state court from ordering a minority church and its spiritual leader to divulge names of members and donors in response to a pre-trial discovery request by the defendant newspaper in a common law libel action, where the church and its leader have been the target of physical and verbal attacks following defendants' publication of articles ridiculing the church and its leader?

This Court denied certiorari on this issue on June 4, 1984. 104 S. Ct. 2690 (1984).

2. *Due Process Claim.* Appellants assert that the trial court violated their constitutional right to due process by

dismissing with prejudice their claims against KIRO and KOMO. This assertion is meritless. This Court has not hesitated to uphold the sanction of dismissal where, as here, litigants willfully and flagrantly halt the discovery process in opposition to the authority of the court and cause impermissible prejudice to their opponents.

Appellants' argument was addressed by this Court in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). There, the Court upheld a trial court's dismissal of an antitrust action for the plaintiff's failure to comply with a court-ordered discovery deadline. Rejecting the plaintiffs' pleas for relief, the Court stated:

> [H]ere, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Id. at 643; *see also Founding Church of Scientology of Washington, D.C., Inc.*, 802 F.2d 1448, 1457-59 (D.C. Cir. 1986).

The U.S. Court of Appeals for the Ninth Circuit echoed these sentiments in *G-K Properties v. Redevelopment Agency*, 577 F.2d 645, 648 (9th Cir. 1978):

> [T]he court dismissed the plaintiffs' action with prejudice. It acted properly in so doing. We encourage such orders. Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism.

Accord Hashemi v. Campaigner Publications, Inc., 737 F.2d 1584 (11th Cir. 1984) (affirming dismissal of libel action for failure to make discovery).

The Washington Supreme Court has likewise emphasized the necessity of having a "structured, orderly system not dependent upon the whims of those who participate therein, whether by choice or by the coercion of a summons and complaint." *Griggs v. Averback Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

The trial court in this case imposed lesser sanctions, to no end. It was patient. Three times it put Appellants on notice that the consequence of defiance was dismissal. *Cf. Jones v. Louisiana State Bar Association*, 602 F.2d 94 (5th Cir. 1979) (per curiam) (upholding dismissal where plaintiff refused to comply with discovery order despite warning that her suit would be dismissed and she would be held in contempt); *Associated Mortgage Investors v. G.P. Kent Construction Co.*, 15 Wn. App. at 228 (dismissal for failure to comply with an order that states prospective sanction comports with due process). Under these circumstances, the trial court properly dismissed Appellants' claims against Appellees.

CONCLUSION

For the reasons stated above, Appellees submit that this case presents no substantial question not previously decided by this Court. The appeal should be dismissed.[6]

DATED this 10th day of September, 1987.

Respectfully submitted,

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* *Counsel of Record*

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[6] Should the Court regard and act upon this appeal as a petition for a writ of certiorari, pursuant to 28 U.S.C. § 2103, Appellees urge the Court to deny the petition. Appellants do not suggest that any conflict exists between the decision in this case and any decision of another state court of last resort or of a federal court of appeals. Nor does this case present any important question that should be addressed by this Court.